

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNITED CEREBRAL PALSY OF NEW YORK CITY

and

Case No. 29-CA-26927

LOCAL 2, UNITED FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO

Nancy Reibstein, Esq., for the General Counsel.
Glenn Rickles, Esq., for the Respondent.
Angela Pace, Esq., for the Charging Party.

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. Upon charges filed by Local 2, United Federation of Teachers, American Federation of Teachers, AFL-CIO, herein called the Union, unfair labor practice charges were filed against United Cerebral Palsy of New York City, herein called Respondent. A complaint issued on June 16, 2005 alleging that Respondent violated Section 8(a)(1) and (5) of the Act by unilateral changes in connection with collective-bargaining agreements between the Union and Respondent. The complaints were amended during the trial of this case on August 17, 2005 in Brooklyn, New York.

Briefs were filed by Counsel for the General Counsel and by Counsel for Respondent. Based upon the entire record in this case, I make the following findings of fact and conclusions of law.¹

At all material times, Respondent, a domestic corporation, with its principal office and place of business located at 80 Maiden Lane, New York, New York, and with treatment facilities in various locations including those located at 160 and 175 Lawrence Avenue, Brooklyn, New

¹ Respondent called Alan Seiler, Director of Human Resources for Respondent as a witness. He testified briefly as to the issuance of the present Employee Handbook and prior handbooks which had issued over the years.

Counsel for General Counsel objected on the grounds only the contents of the Union's collective-bargaining agreement and the contents of the present Employee Handbook were relevant. I sustained the objection. General Counsel introduced the collective-bargaining agreements in issue and Board certifications and Respondent introduced the Employee Handbook in issue.

York, herein called the Lawrence Avenue facilities, and with residences in various locations in New York City, herein called the Residences, is engaged in providing treatment and other services to people with cerebral palsy and other disabilities. During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, purchased and received at its Brooklyn facilities, products, goods and materials valued in excess of \$5,000 directly from points located outside the State of New York.

During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of \$500,000.

It is admitted, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

On August 21, 2000, after the conduct of an election, the Union was certified as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees employed at its facilities located on Lawrence Avenue, Brooklyn, New York, (the Lawrence Avenue unit):

All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment specialists employed by the Employer at its 160 and 175 Lawrence Avenue, Brooklyn, NY facilities, excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.

On April 5, 2002, the Board certified the Union as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees employed at its residential programs, (the Residences unit);

All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors and Guards, as defined in the Act.

On or about May 15, 2003, Respondent and the Union entered into collective-bargaining agreements covering the employees in the Lawrence Avenue and the Residences bargaining units. Article 3 of these agreements (Effective Date and Duration) provides that the agreements were effective from May 15, 2003 through August 28, 2005.

**Respondent Unilaterally Implements and Distributes an Employee Handbook to
Lawrence Avenue and Residences Unit Employees**

It is admitted that on or about April 1, 2005, Respondent unilaterally implemented and distributed an Employee Handbook to employees of both the Lawrence Avenue and Residences Units.

Analysis and Conclusion

Counsel for General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act by the issuance of an Employee Handbook to the employees of Respondent's Lawrence and Residences unit employees which contained alleged unilateral changes in the parties bargaining agreements.

Counsel for Respondent contends that the Board should defer such unilateral changes to arbitration, pursuant to *Collyer Insulated Wire, Inc.*, 192 NLRB 837 (1981). Respondent contends that there is a legislative and court mandate to defer the case because the charge and complaint relates to alleged unilateral changes in an Employee Handbook which changes and alters certain provisions of the parties collective-bargaining agreement.

The practice of deferring to arbitration is founded on broad foundations. First, the courts having recognized a national policy of encouraging resolution of labor disputes through the grievance-arbitration machinery; second, that it is keeping with the statutory policy of the LMRA to encourage the parties to resolve such disputes through the "method agreed upon by the parties"; and third, that "disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by [the] Board of a particular provision of the [NLRA]." *Collyer*, 192 NLRB at 839.

Under *Collyer* and *United Technologies Corporation*, 268 NLRB 557 (1984), deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship;² there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. See also, *Wonder Bread*, 343 NLRB No., 14, slip op. at 1 (2004); *University Moving & Storage Co.*, 2005 WL 2104289 (NLRB 2005).

Counsel for General Counsel contends that Respondent's unilateral changes, alleged in the complaint, amount to a rejection of the parties' collective-bargaining agreement.

Where there is no stable collective-bargaining relationship, or where the Respondent's conduct indicates a rejection of collective-bargaining and the organizational rights of employees, the Board will ordinarily not defer under *Collyer*. *North Shore Publishing Co.*, 206 NLRB 42 (1973). However, where there is "effective dispute-solving machinery available, and if the combination of past and present alleged misconduct does not appear to be of such character as to render the use of the machinery uncompromising or futile." The Board will apply its "usual

² The collective-bargaining agreements in this case are initial agreements. Counsel for the General Counsel does not contend that this is an issue in the case.

deferral policies.” *United Aircraft Corp.*, 204 NLRB 879 (1973) (where occasional first-level supervisory misconduct does not outweigh the fact that the parties’ agreed-upon grievance and arbitration machinery has worked fairly in the past).

5 This balancing test has weighed towards deferral in a line of cases where the employer had allegedly committed unfair labor practices. In *Postal Service*, 270 NLRB 1022, 1023 (1984), the General Counsel argued that deferral was not appropriate because after the parties settled a grievance by the employer’s acceptance of the union’s position on the grievance, the employer basically repeated his prior action. The General Counsel alleged that this constituted
10 a rejection of basic collective-bargaining principles. The Board found, however, that the employer’s action was not “a broad rejection of the applicability of the grievance-arbitration process.” The Board also noted that “there is no contention that the parties are not continuing to process and resolve grievances on other matters.” In *United Beef Co.*, 272 NLRB 66, 67 (1984), a grievance was filed alleging that a shop steward was harassed and discharged for
15 processing grievances. The Board deferred to arbitration, citing language from *United Technologies* that this alleged misconduct “does not appear to be of such character as to render the use of [the grievance-arbitration] machinery...futile.”

20 Deferral to arbitration has occurred in cases in which charges of illegal unilateral changes by employers have been filed. For example, in *Southwestern Bell Telephone Co.*, 198 NLRB 569, 570 (1972) the Board overruled the trial examiner’s decision that the employer’s unilateral action precluded the arbitration process by finding that the “dispute arguably arises from the collective-bargaining agreement between the parties and that it should be submitted for resolution under the grievance and arbitration provisions set out therein.” Furthermore, the
25 Board has held *Collyer* pre-arbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision’s meaning is in dispute. See, e.g., *Inland Container Corp.*, 298 NLRB 715 (1990) (unilateral imposition of drug-testing program); *E. I. Du Pont & Co.*, 275 NLRB 693 (1985) (unilateral changes in certain work schedules); *Standard Oil Co., (Ohio)*, 254 NLRB 32, 34 (1981) (fact that examination is not
30 pinpointed in contracts as a conceded management prerogative is insufficient reason for disregarding proof, if any, that parties intended to permit employer to give such tests when appropriate).

35 In light of the presumption towards deferral to arbitration if it is part of the parties’ collective-bargaining agreement, unfair labor practices, if effective grievance machinery is in place, this case should be deferred to arbitration.

Alleged Unfair Labor Practices-Unilateral Activities of Respondent

40 It is well-established Board law that it is a violation of Section 8(a)(5) of the National Labor Relations Act for an employer to unilaterally institute changes regarding matters that are subjects of mandatory bargaining under Section 8(d). *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Civil Service Employees Association, Inc.*, 311 NLRB 6 (1993), in order for the employer’s unilateral action to be determined unlawful there must be “a material, substantial and
45 significant change” in those terms in conditions. (See also, *Murphy Diesel Co.*, 184 NLRB 757 [1970]).

50 Respondent does not dispute that it unilaterally implemented and distributed an Employee Handbook on April 1, 2005, which is during the time that the agreements between the Respondent and the Union (covering the Lawrence Avenue and the Residences bargaining units) were in effect.

Respondent does dispute that the relevant provisions, which are alleged in the complaint, in the Employee Handbook constitute mandatory subjects of bargaining under Section 8(d). General Counsel contends that the differences between the Employee Handbook and the collective-bargaining agreements were in the areas of vacation days, holiday leave, hours of work, vacancy posting, transfers in and out of units, disciplinary standards, grievance and arbitration procedure, personnel files, and separation from employment.

The General Counsel contends that the unilateral changes regarding vacation scheduling, floating holidays, hours of work, job postings, transfers, disciplinary standards, and the grievance and arbitration procedure all constituted subjects of mandatory bargaining under relevant Board precedent, and such unilateral changes establish a rejection of the collective-bargaining agreement.

The unilateral changes alleged are:³

1. Vacation scheduling has been held to constitute a subject of mandatory bargaining in *Migali Industries*, 285 NLRB 820, 825-26 (1987); See also, *Blue Circle Cement Co.*, 319 NLRB 954, 960 (1995) (where “the Company’s new restriction on its plant employees’ freedom to schedule vacations was a substantial change affecting a condition of employment.”).

2. Changing floating holidays has been held to be a mandatory subject of bargaining. *E. I. Du Pont De Nemours and Company*, 259 NLRB 1210, 1211 (1982). This was an issue in collective-bargaining negotiations.

3. Hours of work and work schedules have been held to be subjects of mandatory bargaining in a long line of Board cases, including *Carpenters Local 1031*, 321 NLRB 30, 31 (1996); and *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993) in which the Board held specifically that changes in employees’ hours of work are mandatory subjects of bargaining.

4. Elimination of job postings have been held to be a subject of mandatory bargaining in *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 656 (2001) (where “failing to post a new...position” was considered a term or condition of employment).

5. Changes regarding transfers have been held to be subjects of mandatory bargaining under *South Western Bell Telephone Company*, 247 NLRB 171, 173 (1980) (where “Inplant promotions...and transfers, as well as nondiscrimination provisions, are mandatory bargaining subjects.”)

6. Changes to the disciplinary standards are found to be mandatory subjects of bargaining. See, *Toledo Blade Company, Inc.*, 343 NLRB No. 51 slip op. at 5 (2004); see also, *Migali Industries*, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); *Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining).

7. Changes in the grievance and arbitration procedures have also been held to be mandatory subjects of bargaining. See, e.g., *U.S. Gypsum Co.*, 94 NLRB 112 (1951); *United Electrical, Radio & Machine Workers v. NLRB*, 409 F.2d 150 (D.C. CIR. 1969), enf’d. 164 NLRB 563 (1967).

³ These violations are alleged specifically in the complaint.

I find these unilateral changes are not sufficient to establish a rejection of the collective-bargaining agreements in issue.

The most troubling unilateral change is the Handbook's grievance provision.

5 Respondent inserted in its Handbook, two preconditions before applying the grievance procedures as set forth in the parties' collective-bargaining agreement. These preconditions are that (1) the employees must discuss with their immediate supervisors any questions or complaints, and (2) if not satisfied, the employee should then talk to their program director. If the grievance is not resolved, then the employees can file a grievance with the Union pursuant to the grievance procedure set forth in the parties' collective-bargaining agreement.

15 This unilateral change is troubling because the employees must try to resolve their grievance, as set forth above, without Union participation, and before a formal grievance can be filed with the Union. However, an employee still has the ultimate right to invoke the contractual grievance procedures. I find Respondent's unilateral change in the grievance procedure troubling, but not sufficient to establish a rejection of the collective-bargaining agreement for the reasons set forth above.

20 Counsel for General Counsel also contends that a Handbook provision requiring that employees may be asked to submit medical documentation for any absence due to illness, and non medical documentation for non medical absences is violative of Section 8(a)(1) and (5) of the Act, and evidence of a rejection of the collective-bargaining agreement.

25 In view of the broad scope of *Collyer*, I find this unilateral change does not amount to a rejection of the *Collyer* doctrine for the reasons set forth above.

General Counsel further contends that Respondent had the right to change and or eliminate employees' terms and conditions at any time, and without advanced notice. Specifically, the Handbook states in relevant part:

30 UCP/NYC's personnel policies, practices and benefits are periodically reviewed and are subject to change. The Agency may change, cancel or suspend any of its personal policies at anytime without advance notice, although where and when practical,
35 UCP/NYC will notify employees of significant changes through Administrative Memoranda or by another means. However, no individual supervisor or administrator may independently alter the personnel practices described in the Handbook.

40 Additionally the Handbook states:

45 I realize that it is my responsibility to become familiar with the Handbook, to comply fully with the policies and procedures contained in the Handbook and that such policies may be revised from time to time, with or without prior notice to me. I further realize that if there is a conflict between one or more Agency policies, the most recently issued policy will apply.

50 I find such unilateral change is within the scope of *Collyer* and I find it is not sufficient to establish a rejection of the collective-bargaining agreement for the reasons set forth above.

Counsel for General Counsel relies on *Heck's Inc.*, 293 NLRB 1111 (1989) to establish that the above unilateral changes should not be deferred because they establish a rejection of the parties' collective-bargaining agreement.

5 *Heck's* is a case involving two facilities, a union facility and a non union facility. In this connection the Board stated:

10 The consolidated amended complaint alleges that certain conduct of the Respondent was unlawful at both of the Respondent's facilities involved in this case: Its unionized retail store in Wheeling and its non-unionized warehouse in Nitro. Thus, only some of the issue before us could be deferred to the contractual "Dispute Procedure" in effect at the Wheeling location. Because we must determine at least a part of the instant dispute, there is no compelling reason for deferring other aspects of the dispute to the grievance arbitration machinery at Wheeling, and we decline to do so.

20 Thus, I find a reliance on *Heck's* is inapplicable to the alleged unilateral changes in the instant case.

25 In conclusion I find, that in the instant case there are no impediments to deferral. I also find that deferral will fulfill the Act's mandate to foster the practice and procedure or collective-bargaining.

Conclusions of Law

30 1. At all times material herein Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

35 3. Respondent and the Union are parties to collective-bargaining agreements with the Residences facility concerning an appropriate unit within the meaning of Section 9(c) of the Act:

40 All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all other employees including Managerial Employees, Confidential Employees, Supervisors and Guards, as defined in the Act.

and with the Lawrence Avenue unit covering:

45 All full-time and regular part-time physician assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapy assistants, physical therapy assistants, licensed practical nurses, custodians, and supportive employment

specialists employed by the Employer at its 160 and 175 Lawrence Avenue, Brooklyn, NY facilities, excluding all other employees including confidential employees, office clerical employees, managerial employees, supervisory employees and guards.

5

4. This case should be deferred pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Remedy

10

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on the proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

15

Dated, Washington, D.C. December 7, 2005

20

Howard Edelman
Administrative Law Judge

25

30

35

40

45

50